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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	**WT Docket No. 96-18**
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	**PP Docket No. 93-253**

PETITION FOR RECONSIDERATION AND CLARIFICATION

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To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Paging Network, Inc. ("PageNet"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby petitions the Federal Communications Commission ("FCC" or "Commission") to reconsider and clarify certain aspects of its *Second Report and Order* in the above-referenced docket.[1]

INTRODUCTION AND SUMMARY

PageNet is fully supportive of certain of the underlying principles stated by the Commission in the *Order*, or which otherwise underlie it. For example, PageNet has long been an advocate of auctions as a means of spectrum allocation for unencumbered spectrum, and worked with Congress to assure the Commission had auction authority. PageNet has long been an advocate of wide-area licensing, filing the first proposal to the Commission that it consider wide-area licensing of 931 MHz channels many years ago. PageNet has participated in two auctions, paying the Commission approximately $250,000,000 in

[1] 62 FR 11616 (March 12, 1997)(the "*Order*").

spectrum fees for narrowband PCS and 900 MHz SMR spectrum over which PageNet is or will offer a diverse array of services. It agrees with the Commission that "competitive success [should be] dictated by the marketplace, rather than by regulatory distinction." *Order* at ¶ 4.

However, PageNet cannot support the way in which the Commission has devised auctions for the few remaining 929-931 MHz licenses. The rules that the Commission has adopted create artificial mutual exclusivity, resulting in contrived auctions that further no public interest rationale. Moreover, the Commission has ignored the fact that, unlike any other auctions held to date, the incumbents are generally already serving upward of two-thirds of the population in many areas, and thus only the incumbents can offer, or expand, the wide-area systems promoted by the Commission, no matter who the winner is of any auction.

The Commission has set for auction "white space" that has legitimate value only to the incumbent licensees. It has value to "Greenmailers" only because they might arguably be permitted to do no more than place a single transmitter in the remaining white space for five years, restricting the incumbent paging carrier from meeting public demand for its system's expansion into the more remote areas of the MTA. This forces paging carriers into a Hobson's choice: paging carriers will be forced to bid, not at the legitimate value of the few remaining transmitter locations, but to keep those locations from falling into the hands of someone else who seeks only to extract exorbitant rates from them for the future right to expand the incumbent's wide-area system. This result is not in the public interest.

Furthermore, auctions, now, for incumbent paging carriers, present exceptionally difficult challenges. The messaging industry is scrambling as fast as it can to, among other things: digest new and changing regulatory paradigms resulting from the Telecommunications

Act of 1996; build out systems for which millions of dollars have already been paid to the U.S. Treasury; enforce the terms of the Commission's interconnection orders which have not been stayed; address LECs, who continually threaten to turn off service or discontinue providing new service; prepare to and participate in federal and state negotiations, arbitrations and proceedings addressing the appropriate level of compensation for paging services; and participate in universal service proceedings at the federal and state level.

Moreover, incumbent paging carriers must continue providing full service to their customers and assure value for their stockholders, all at a time when messaging stocks are at their lowest levels, and telecommunications stocks generally are deflated. This, coupled with the fact that the Commission's goal of achieving wide-area paging has already been accomplished in the marketplace, suggests it would be reasonable to delay the auctions at least until there is time to cautiously think about the rules themselves, and carriers have time to rationally formulate strategies in an environment of more certainty as to future costs and expenses, and the economic return of their systems.

Accordingly, at a minimum, PageNet requests that the Commission do the following:

1. Delay the auctions until there is regulatory stability.

2. Establish eligibility criteria for bidding on the MTA licenses, *e.g.*, one would have to be able to serve two-thirds of the population in order to be eligible to bid.

3. Eliminate its "substantial service" showing.

4. Eliminate the ability to check the "all" box on the short form application.

5. Relate total upfront payment amounts to the licenses identified on the short form application either by requiring the bidder to pay a separate upfront payment for each license identified or a substantial percentage of the aggregate total of the upfront payment amounts for the licenses identified on the short form application.

In addition to these changes, PageNet also seeks reconsideration and/or clarification of other aspects of the *Order*.

I. THE COMMISSION'S AUCTION RULES NEED SUBSTANTIAL REVISION TO BRING THEM IN ACCORD WITH THE COMMISSION'S STATED POLICIES AND THE COMMUNICATIONS ACT

A. The Commission Should Devise Auction And Service Rules Which Recognize That Wide-Area Services Already Exist At 929-931 MHz

Carriers operating in 929-931 MHz have already achieved the stated goals of the Commission in conducting these auctions, *e.g.*, to create wide-area paging systems. They have done this through site-by-site licensing, expanding their systems as market demands and capital allowed. Now, in the major markets, for a majority of 929-931 MHz channels, operating incumbents already serve at least two-thirds of the population of the area that will comprise the geographic license. This means that, for most 929 and 931 MHz MTA licenses to be auctioned, no new licensee could meet the construction requirements of the MTA license. Because the market has already determined who the geographic licensee is for most frequencies at 929-931 MHz, paging spectrum will not be efficiently utilized and paging customers not provided a high-quality service, *i.e.*, wide-area, if the Commission does not award the geographic license to the incumbent who already covers two-thirds of the population.

In disregarding the commenters who asked either that channels already used extensively by an incumbent be exempt from the bidding process or that eligibility be restricted in situations where incumbent licensees already serve at least two-thirds of the population, the Commission noted that it believed that "the market, not regulation, should determine participation in the competitive bidding ... and ... potentially will result in further wide-area coverage of paging services." *Order* at ¶ 44. However, when an incumbent

already serves two-thirds of the population, assuring the future "wide-area" coverage of paging systems can only be accomplished by the incumbent. The incumbent already has two-thirds population build-out. Only the incumbent can expand its own system.[2]

The Commission's approach accomplished the opposite of its stated intent. It: (1) creates opportunities for greenmail -- forcing resale of the license at an inflated cost to the incumbent; (2) increases the cost of service to the unserved area and ultimately the costs of the whole area served by requiring the incumbent to buy that small portion at auction; and (3) if the new entrant is the high bidder, blocks the incumbent's ability to expand and provide the widest area coverage possible. Simply put, an applicant is not a qualified applicant under Section 309(j) of the Act if that bidder cannot meet the construction benchmark of covering two-thirds of the population because operating incumbents already exist in the geographic area. As such, eligibility for licenses where operating incumbents already cover two-thirds of the population should be based on incumbency. At best, everyone else is a speculator who would not be able to provide wide-area services and whose provision of niche service would be at the expense of the system serving the vast majority of the population.

On reconsideration, the Commission should, prior to auction, award the geographic license to any operating incumbent that can demonstrate that it covers two-thirds or more of

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[2] The Commission has the flexibility to recognize incumbency in this manner even where, for example, with SMR frequencies it did not do so. As the Commission here recognizes, the incumbents serve most of the wide area already, with vigorously competitive systems built throughout. The paging industry serves over 40 million subscribers in less than 4 MHz of spectrum, compared to 2-3 million for all of SMR on more than 10 MHz of spectrum. Further, these paging systems are truly built out, with tens of thousands of transmitters, as opposed to the few thousand transmitters, if that, operating on the SMR frequencies. And, as the Commission recognizes, the technology is mature. Thus the Commission is not bound by, *e.g.*, SMR precedents.

the population of the geographic license. Alternatively, if two-thirds of the population of a geographic license is covered by operating incumbents, only existing same-channel incumbents within the geographic area or same-channel incumbents operating in an area adjacent to the white space of the geographic license should be considered as eligible bidders for the geographic license. This will ensure that the Commission meets its primary goal of licenses providing high quality, *i.e.*, wide-area, service to the public in an expeditious manner.

B. The "Substantial Service" Test Embodied In Section 22.503(k)(3) Should Be Deleted Because It Conflicts With The Requirements Of The Act And Undermines The Goals Which The Commission Sought To Achieve By Adopting Geographic Licensing

In the *Order*, the Commission found that "geographic area licensing provides flexibility for licensees and ease of administration for the Commission, facilitates further build-out of wide-area systems, and enables paging operators to act quickly to meet the needs of their customers."[3] These goals and the specific objectives underlying the Commission's adoption of coverage requirements for those awarded licenses are undercut by use of a "substantial service" test.

In Section 22.503 of its new rules, the Commission has specified the minimum coverage requirements for geographic licensees awarded licenses following the auction. After three years, such a licensee must cover one-third of the population in the paging geographic area or notify the Commission that "it plans to satisfy the alternative requirement to provide substantial service in accordance with paragraph (k)(3)." After five years, the geographic licensee must construct and operate facilities to cover two-thirds of the population

[3] *Order* at ¶ 15.

in the paging geographic area or notify the Commission that it has "satisfied the alternative requirement to provide substantial service in accordance with paragraph (k)(3)." Paragraph (k)(3) simply provides that a geographic licensee may demonstrate that "it provides substantial service to the paging geographic area." The rule goes on to define "substantial service" as "service that is sound, favorable and substantially above a level of mediocre service which would barely warrant renewal."

In proposing to use coverage requirements, the Commission's stated goal was to assure that "spectrum is used effectively and services implemented promptly".[4] This purpose was reiterated in its *Order* where the Commission, referencing Section 309(j)(4)(B) of the Act, found that:

> [C]overage requirements are needed as performance requirements to deter speculation while promoting prompt service to the public. Coverage requirements are also necessary to prevent warehousing, promote deployment of technologies and services, and promote service to rural areas.[5]

This substantial service does not further these goals but undercuts them. It neither assures that spectrum is used efficiently nor that services are implemented promptly.

The substantial service test is also inconsistent with the second goal cited by the Commission, encouraging area-wide service. As an alternative to the objective coverage tests contained in (k)(1) and (2), this amorphous test would encourage people to bid for licenses clearly incapable of meeting the coverage tests in (k)(1) and (2) due to the presence of incumbents. If such bidders are successful and, after five years, are providing any kind of service to areas not served by incumbents, they might satisfy the renewal test and, thus, this

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[4] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3117 (1996) ("*Notice*").

[5] *Order* at ¶ 63.

test as well. This would result not in wide-area paging systems, but a geographic licensee serving only a small portion of the licensed area. Indeed, it would prevent the incumbent already providing a wide-area service from expanding that service.

By making it feasible through use of the substantial service test for others to obtain and retain a geographic license in an area heavily served by incumbents, the Commission has inadvertently opened the door to speculation and anticompetitive conduct. Speculators will be encouraged to bid in the hope of forcing the incumbent to buy them out at some point after the auction. Use of the substantial service test makes it unlikely that the license would ever be taken away from the speculator and increases pressure on the incumbent to buy him out if it needs to expand.

It is equally obvious that this test provides an opportunity for anti-competitive conduct as, for example, where a paging operator using one frequency to serve a market would be able to block the expansion of his rival on a different frequency by obtaining the geographic license for his rival's frequency. In this way, the first operator may be able to obtain a significant marketing advantage through its greater coverage. It does so, however, not so much by building out its own system as by blocking the expansion of its rival's system. Even if the incumbent is able to outbid the competing operator at the auction, the first operator will have forced its rival to pay a high price for future expansion. The public interest is not served by either speculation or this type of anti-competitive conduct and both can be eliminated by relying solely on the coverage criteria to retain the geographic license.

Using the substantial service test as an alternative for the population coverage requirements poses another problem. Any licensee in danger of failing to meet the population coverage test can simply claim that it has complied with the substantial service test and leave it to the Commission to convince a court that it has failed to do so. Since

there are virtually no precedents to flesh out this concept, nor any discussion in the Commission's *Order* here as to what would constitute substantial service in this context, it would be very difficult to convince a court that the Commission has given fair notice to licensees of what is expected of them. In short, if the Commission adopts the substantial service test, it might just as well throw away the population coverage requirements. To do so, however, would be to directly violate Section 309(j)(4)(B) of the Act which requires performance requirements and protection against abuse. The solution is an obvious one: the elimination of the substantial service test. In the absence of a demonstrated need for an alternate type of showing, for which there is none in the present record, this standard is likely to engender great difficulties with little benefit to the public.

While it is apparent how the objective coverage tests prescribed in (k)(1) and (2) are administratively simple and encourage development of wide-area systems, it is not at all clear how the substantial service standard developed for an entirely different purpose could be an alternate means to these same ends. Using the substantial service test would be anything but administratively simple. Because of the complete lack of any definite standard, substantial service must be determined on a case-by-case basis. Here, however, the *Order* gives no indication of what showing would satisfy this test and also comply with the mandate of Section 309 (j)(4)(B) of the Act. Given the difficulty in applying this same standard in other services where renewal proceedings can drag on for decades, *see e.g.*, *RKO General, Inc.* 3 FCC Rcd 5057 (1988), using it here is an invitation to prolonged litigation, inconsistent with the Commission's goal of administrative efficiency, and will prolong blockage of operating incumbents wishing to expand their existing wide-area service to meet the requirements of the public.

C. The Commission Should Require A Shorter Timeframe For Build-Out

In order to ensure that bidders are sincere and that high-quality service, *e.g.*, wide-area service, is expeditiously provided to the public, PageNet believes that the Commission should adopt construction benchmarks that would require the geographic licensee to cover one-third of the population of the geographic area in one year, and two-thirds of the population within three years. This will ensure that paging spectrum is utilized quickly to provide high quality service to the public. PageNet wishes to point out that this is not an onerous requirement. At 900 MHz, significant build-out already exists; the equipment needed is readily available and inexpensive; and paging carriers have already required and have demonstrated that they are capable of the build-out of significant systems in an eight-month to one-year period, *e.g.*, nationwide PCP (300 transmitters) and regional PCP (70 transmitters) systems.

D. Allowing Applicants To Check The "All" Box On The Short Form Application Violates Section 309(j)(6) Of The Act By Artificially Creating Mutual Exclusivity Among Applicants

The ability of a bidder to check the "all" box on the short form application violates Section 309(j)(6)(E) of the Act because it artificially creates mutual exclusivity among applicants.[6] In the paging auctions, because of the number of highly incumbered licenses, it

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[6] Section 309(j)(6)(E) provides that nothing in this subsection, or in the use of competitive bidding, shall:

> [B]e construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and license proceedings.

(continued...)

is not rational to conclude that each applicant, or in this instance any applicant, will actually bid on every license. Yet, the Commission's rules in this auction will force that result because the rules as designed encourage them to do so. Since checking the "all" box is more convenient than listing 20 or 30 licenses, bidders will naturally check the "all" box without any intention to bid on the many hundreds of licenses slated for auction.

Furthermore, allowing applicants to check the "all" box and make upfront payments that are less than the aggregate total upfront payments which would be due if the applications were for individual licenses, simply encourages this result. For example, if the Commission determined to adopt upfront payments for the paging auction in the range from $2,500 to $10,000 per license and a bidder that checks the "all" box on its short form application pays an upfront payment of $2,500, that bidder would only be eligible to bid on a license whose upfront payment was $2,500. Because the bidder is not eligible to bid on any license whose upfront payment amount is over $2,500, even though the bidder checked the "all" box, the bidder has not actually applied for any application whose upfront payment is over $2,500. Yet, the Commission's rules do not recognize this, instead treating all MTA licenses for which the "all" box is checked as mutually exclusive in violation of Section 309(j)(6)(E).

For these reasons, the Commission must not allow bidders to check the "all" box on their short form applications.

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[6](...continued)
47 U.S.C. § 309(j)(6)(E). *Also see* H.R. Rep. No. 103-111, 103rd Cong., 2d Sess. 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 585.

E. Upfront Payments Should Be Based On The Total Aggregate Upfront Payments Of All The Licenses Identified On The Short Form Application

In the *Order*, the Commission correctly determined that a specific upfront payment amount should be established for each license to be auctioned. *Order* at ¶ 134. The Commission reasoned that specific upfront payment amounts were "important . . . to deter speculation and ensure, to the greatest extent practicable, that only sincere bidders participate in the auction." *Order* at ¶ 134. Unfortunately, the benefit of requiring specific upfront payment amounts is obviated by the Commission's decision to allow a bidder to apply for every available license on its short form application and submit only one upfront payment. *Order* at ¶ 136. This encourages speculation, not deters it. The Commission should, therefore, modify its upfront payment provisions so that the total number of upfront payments made by a bidder relate directly to the total number of licenses chosen on the bidder's short form application.

F. A Blind Auction Is Inappropriate for Paging

The Commission's decision not to disclose the identities of bidders under the circumstances prevailing in this auction[7] is in error and inconsistent with all of its precedents. As the Commission recognized in the *Order*, in the *Competitive Bidding Second Memorandum and Order* the Commission determined that it generally would release the identities of bidders before each auction.[8] The Commission stated that the advantages of disclosing bidder identities outweigh the disadvantages of attempting to maintain the confidentiality of certain information. Specifically, the Commission noted generally that

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[7] *Order* at ¶ 106.

[8] *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, ("*Second Memorandum Opinion and Order*"), 9 FCC Rcd 7245, 7242.

maximizing the available information minimizes bidder uncertainty, and improves the efficiency of license assignments by allowing more accurate valuation of licenses.[9] As noted below, these advantages are even more persuasive in this proceeding than in previous proceedings where the Commission has released bidder identities. Indeed, in the *Order*, the Commission itself emphasized the importance of providing bidders with full information in order to maximize the efficiency of license awards.[10] By contrast, here the Commission has not offered a sufficient basis upon which to justify a deviation from its past information disclosure practices.[11]

Although the Commission has expressly reserved the option to withhold bidder identities for a particular auction, PageNet submits that this is not an appropriate proceeding in which to test the effects of not releasing bidder identities.[12] The Commission's experience has *not* demonstrated that it is "desirable" to withhold bidder identities; rather, as noted above, the Commission consistently has reaffirmed the importance of releasing complete and accurate bidder information.

Moreover, the Commission has recognized the difficulties inherent in preventing bidder identities from being revealed.[13] Of paramount concern to PageNet with regard to

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[9] *Id. Implementation of Sectin 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order, Second Report and Order*, 9 FCC Rcd 2348, 2375.

[10] *See, e.g., Order*, at ¶ 97.

[11] The Commission speculates that confidentiality would frustrate inappropriate bidding strategies and speed the pace of the auction. *See Order* at ¶ 106.

[12] *See Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252.

[13] *Implementation of Section 309(j) of the Communiations Act - Competitive Bidding, Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858, 6865.

this proceeding is the overwhelming probability that PageNet and other incumbent carriers will be readily identifiable as bidders, or as within a small group of bidders, in those markets where they are currently providing service, and hence will be subject to the very abuse that the Commission hopes to forestall through non-disclosure. As the Commission has noted, if some bidders know other bidders' identities, those bidders will have an unfair advantage in the quality of information available to them and in their potential ability to frustrate bidding strategies.[14] Accordingly, the Commission's position that limiting available information will prevent "strategic gaming practices" from occurring is flawed. *Order* at ¶ 106. An incumbent carrier's market position is such that limiting the information available to bidders in this proceeding will have a disproportionately detrimental effect on such carriers. Under these particular circumstances, and given the Commission's recognition of problems with maintaining bidder confidentiality, PageNet submits that bidder identities should be released in this proceeding.[15]

G. A License-By-License Stopping Rule Will Better Achieve The Commission's Goals of Reducing The Risk Of A Prolonged Auction And Providing Expeditious Service To The Public

In the *Order*, the Commission adopted a three-phase hybrid simultaneous/license-by-license stopping rule. *Order* at ¶ 103. The Commission should, instead, adopt a single

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[14] *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252.

[15] The Commission should also revise its determination not to disclose full ownership and other information regarding bidders in the auction. *Order* at ¶ 159. Full disclosure of ownership information allows the Commission to gather the information necessary to enforce ownership requirements of the Communications Act and to accord special provisions to certain classes of applicants. The Commission should require applicants to disclose entities and individuals that own more than five percent (5%) of the applicant, or have provided more than five percent (5%) of the applicant's equity.

phase license-by-license stopping rule because the paging licenses, particularly because of the incumbency that exists at 900 MHz are not fungible. After five rounds in which no new bids are placed on a license, the auction for that license should close. If a license has value to more than one bidder because of adjacency or because there are two incumbents within an MTA, the license will certainly receive a new bid once every five rounds. Bidders will keep the auction open for that license by bidding. Licenses that have value to anyone other than the incumbent will remain open, licenses that do not have such value will close. This places the emphasis of the auction on spectrum that has value, will speed the auction, and prevent the speculative hopping from license to license by those bidders that have no real intention of providing service to the public.

H. Safe Harbors Should Be Adopted For Incumbents During The Auction

The Commission should reverse its determination not to adopt safe harbors for incumbent operators in order to avoid having auctions disrupt the normal course of business. *Order* at ¶ 156. In the normal course of business, communications carriers may become involved in discussions regarding mergers, acquisitions and inter-carrier arrangements that are necessary to meet the business goals of these carriers as well as provide high quality service to customers. This is particularly true with incumbent systems operators, whereas, for new or less utilized spectrum, it may not have been as necessary to assure that there is no disruption to the market. These safe harbors are also necessary in light of the number of licenses at issue in a single auction, making this auction unique in that regard. For these reasons, safe harbors should be created that would allow incumbent carriers to discuss mergers, acquisitions, intercarriers and other business matters during the pendency of the auction.

I. Bidding Credits And Installment Payments Should Not Be Applied To Paging Licenses

The Commission should reconsider its adoption of bidding credits in the context of the paging auction. *Order* at ¶ 179. Bidding credits are both unnecessary and unfair to incumbent operators. In the first instance, there are hundreds of paging carriers both large and small. Small carriers are already fully represented in this service. Moreover, bidding credits are unfair to the operating incumbents because they create a situation where non-incumbents may be able to pay a lower price for spectrum than the incumbent that is already substantially built-out. Installment payments work to the same detriment to the incumbent license and ultimately to the public because wide-area service is not available within a geographic area. The Commission should consider fully whether the U.S. government should be loaning money to entities that could not meet the construction benchmarks and cannot provide high quality, *i.e.*, wide-area, service to the public.

J. The Commission Should Provide Information Regarding The Population Coverage Of Incumbents Within The MTAs Prior to Auction

The key to a fair and successful auction is information regarding how much population is already served by the incumbents. Because such records are in the Commission's sole possession, the Commission should provide that information to the public prior to the filing of the short form applications. This will allow each potential applicant to review its eligibility to apply and its ability to acquire specific licenses at auction, and, more importantly, retain those licenses under the Commission's construction benchmarks. This should aid in thwarting speculation investment schemes because, for the most part, bidders will understand that buying the white space in an MTA that covers less than one-third of the population is simply a waste of money. These investors will understand, as the Commission

should, that very few bidders, if any, could pursue an auction strategy where they would buy white space that could, at a maximum, cover less than one-third of the population and additionally, then, buy out an incumbent that has an existing infrastructure to cover two-thirds or more of the population, in order to meet the construction requirements. Full disclosure of the status of the incumbents will assist the FTC and FBI efforts to reduce fraudulent FCC license investment schemes, speed the auction, and speed high quality, *i.e.*, wide-area, service to the public, because it will more readily expose fraudulent claims and grandiose marketing schemes.

II. SECONDARY AND GRANDFATHERED PCP LICENSES SHOULD NOT BE GRANTED FULL CO-CHANNEL PROTECTION

PageNet requests clarification that the Commission did not intend that exclusive PCP licensees must provide full co-channel protection to grandfathered and secondary systems. Any other reading of this newly adopted Section 22.503(i) would require geographic nationwide PCP licenses to terminate their sharing of existing systems for the benefit of grandfathered licensees, contrary to the Commission's exclusivity rules. Moreover, nationwide build-out plans based upon the status of PCP incumbents, grandfathered or secondary, will be disrupted or obviated. Because the Commission could not have intended to diminish the nationwide licenses in this way, the Commission should clarify that the status of nationwide licensees *vis-a-vis* incumbents has not been modified by the *Order* or the revised rules.

In the *PCP Exclusivity Order*, the Commission determined that exclusivity would encourage the construction of wide-area, high capacity paging systems, and PageNet and

others constructed and are operating such systems.[16] The elevation of grandfathered and secondary systems which, by definition, did not earn exclusivity, is inconsistent with the Commission's earlier finding. Grandfathered licensees that did not meet the exclusivity requirements made this choice on an affirmative basis. It is not in the public interest to permit a grandfathered or secondary system to block a nationwide or MTA licensee from serving area subscribers required as part of a wide-area paging system. In other words, granting co-channel protection in this circumstance would negate the ability of nationwide and MTA licensees to serve throughout those areas, creating holes in their systems and, thus, holes in coverage affecting the public. The Commission should clarify that it did not intend to award exclusivity (*i.e.*, full co-channel protection) to grandfathered and secondary PCP operators.

Prior to the *Order*, there were essentially four types of PCP systems: geographic nationwide exclusive, regional and local exclusive, grandfathered, and secondary.[17] In the *PCP Exclusivity Order*, the Commission determined that exclusivity was the appropriate mechanism to ensure that paging systems served enough area to be in the public interest and to provide incentives for the investment in wide-area paging systems.[18] For the nationwide and other exclusive systems, the Commission rewarded the licensees for building exclusive systems with co-channel protection from future systems.

Providing full co-channel protection to secondary and grandfathered PCP systems is constitutionally unlawful. By proposing to modify the manner in which nationwide licensees

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[16] *PCP Exclusivity Order*, 74 RR2d 131, 133-134 (1993).

[17] Secondary systems are systems that were authorized as exclusive systems but the licensee did not construct a system that qualified for exclusivity. *See* 90.495(c)(1).

may utilize their nationwide channel with respect to grandfathered and secondary systems, the Commission will be taking a portion of the economic benefit upon which nationwide licensees previously relied. As Section 22.503 is written, even if the nationwide systems are presently sharing with grandfathered systems, that sharing will be terminated and the nationwide systems required to protect the grandfathered incumbent upon the effective date of the *Order*. In addition, the nationwide licensees continue to build-out their nationwide systems, and the investment in that build-out has been in reliance upon the fact that it could share the channel with grandfathered licensees and require interference free operation of any secondary licensee. Upon implementation of the rules adopted in the *Order*, the Commission will engage in a "taking" of property interests for which it lacks the authority and for which, in any case, faces an obligation to pay compensation pursuant to the Fifth Amendment of the United States Constitution.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, PageNet request that the Commission reconsider and clarify the *Order* in accordance with this Petition.

Respectfully submitted,

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